Supreme Court, U.S.
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No. 94 - _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

In re ARTHUR CALDERON,
Warden of San Quentin
Prison and
DANIEL E. LUNGREN,
Attorney General of the
State of California

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (WILLIAM C. CANBY, JR., STEPHEN REINHART, AND STEPHEN S. TROTT, CIRCUIT JUDGES)

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QUESTION PRESENTED

Does the state's interest in the administration of criminal justice and finality of judgments dictate that the Ninth Circuit Court of Appeals should issue an opinion in a capital case after denial of habeas corpus within 120 days of submission of a case for decision following briefing and oral argument?

Is the failure to issue an opinion seven months after oral argument in a death penalty case and over five years after issuance of a federal stay of execution inconsistent with this Court's directive in In re Blodgett, 502 U.S. ____, 116 L. Ed. 2d 669, 112 S. Ct. 674 (1992) that the court must "exercise all due diligence and render its opinion forthwith"?

PARTIES

Warden Arthur Calderon and California Attorney General Daniel E. Lungren are the

Petitioners for the State of California. Melvin Meffrey Wade, an inmate sentenced to death under the laws of California, is the subject of the underlying appeal from the denial of a Petition for Writ of Habeas Corpus.

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PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (WILLIAM C. CANBY, JR., STEPHEN REINHART, AND STEPHEN S. TROTT, CIRCUIT JUDGES)

Petitioners pray that, pursuant to the All Writs Act, (section 1651, subdivision (a) of Title 28 of the United States Code), a Writ of Mandamus be issued in Wade v. Vasquez, Case Number 90-56332, to compel the United States Court of Appeals for the Ninth Circuit (the Honorable William C. Canby, Jr., Stephen Reinhart, and Stephen S. Trott, Circuit Judges) to decide the appeal that has been pending before it for over three years

since the initial certificate of probable cause issued and over seven months since oral argument was heard and the case was submitted for decision.

OPINIONS BELOW

Melvin Wade, an inmate sentenced to death under the laws of California, has appealed the denial of his petition for writ of habeas corpus challenging his 1982 state court conviction. A federal stay of execution issued on January 12, 1989, remains in effect.

On May 21, 1982, Melvin Wade was sentenced to death for the murder of his 10-year-old step-daughter. His conviction and sentence were affirmed on direct appeal. People v. Wade 44 Cal.3d 366, 750 P.2d 794, 244 Cal.Rptr. 905 (1988); Wade v. California, 488 U.S. 100, 102 L. Ed. 2d 237, 109 S. Ct. 248 (1988).

On January 12, 1989, a stay of execution was issued by the district court

and a Petition for Writ of Habeas Corpus was filed. On February 12, 1990, the district court ordered an evidentiary hearing on claims of ineffective assistance of counsel and jury misconduct. After an evidentiary hearing, the district court denied writ of habeas corpus on September 14, 1990. Wade v. Vasquez, 752 F.Supp. 9, 31 (C.D. Cal. 1990). Certificate of Probable Cause was issued on December 17, 1990.

On April 21, 1992, the Ninth Circuit Court of Appeals supplemented the record on appeal with special counsel's exhibits A through Z and remanded the case to the district court to permit special counsel to present additional facts on Wade's pre-hearing request for substitution of counsel and to permit the district court to receive any additional evidence it deemed appropriate on the conflict issue. The district court held a

second evidentiary hearing on remand on August 31, and September 1, 1992. On December 9, 1992, the district court issued an opinion and order finding neither Attorney Helft nor the public defender had any conflict of interest. Certificate of Probable Cause issued on March 4, 1991.

Both the merits and conflict issues were briefed on appeal. On June 16, 1993, oral argument was presented to Justices Reinhart, Canby and Trott and the case was submitted for decision. No opinion has issued.

There has been a federal stay of execution on this case since January 12, 1989, which remains in effect.

On December 3, 1993, Respondents requested a decision on the case by letter to the Ninth Circuit Court of Appeals. No reply to that request was issued.

On January 31, 1994, the State filed a "Motion for Decision Within 60 Days." On February 7, 1994, the motion was denied. The court observed that the motion involved "a first petition" and was inconsistent with its duty to give a full and fair consideration to all of the issues presented in the case. Exhibit A. Over five years after the issuance of a federal stay of execution, no opinion has been filed in this case

JURISDICTION

This Court has jurisdiction under sections 1651, subdivision (a) and 2254 of Title 28 of the United States Code and Rule 20.1 of the United States Supreme Court Rules.

The district court had jurisdiction in Wade's petition for writ of habeas corpus under sections 2241, subdivision (a) and 2254 of Title 28 of the United States Code.

The Court of Appeals has jurisdiction to review the denial of the petition for writ of habeas corpus under section 1291 of Title 28 of the United States Code.

STATEMENT OF THE CASE

A. Procedural Background

1. Direct Appeal

A jury convicted Wade of the 1981 murder of his 10-year-old step-daughter, Joyce. After accusing the child of smelling and not washing herself properly, Wade beat her with his fists, a wooden board from a broken couch and kicked and stomped her. Wade placed Joyce inside a military duffle bag which he hoisted into a crawlspace in a ceiling above the bedroom, threw her against a wall with such force that her head penetrated the wall and at one point tried to hang her to a wall by a dog leash. The child died from wounds suffered during the

22-hour ordeal. People v. Wade, 44 Cal. 3d 366, 244 Cal. Rptr. 905, 750 P.2d 794 (1988).

2. Federal Habeas Corpus, District Court Evidentiary Hearings and Appeal

Wade filed a federal habeas corpus petition on January 12, 1989, then returned to state court to exhaust his remedies by filing a petition on March 27, 1989. That petition was denied on June 21, 1989, and Wade amended his federal petition on August 8, 1989.

On May 22, 1990, a one-week evidentiary hearing commenced in the district court before the Honorable Manuel Real, on issues of jury misconduct and ineffective assistance of counsel. The writ of habeas corpus was denied on September 14, 1990. Wade v. Vasquez, 752 F. Supp. 9 (C.D. Cal. 1990). The Ninth Circuit remanded the case on April 21, 1992, for the district court to receive

any additional evidence it deemed appropriate on Wade's claim that his public defender had a conflict of interest. After an evidentiary hearing on August 31, and September 1, 1992, the district court decided on December 9, 1992, that there was no conflict of interest. An appeal was taken from that decision. The issues raised by the denial of the writ of habeas corpus and findings on the conflict claim were fully briefed.

On June 16, 1993, the appeals from the denial of the writ and conflict of interest ruling were argued and submitted for decision.

On February 7, 1994, the State's motion for a decision was denied. This petition follows that denial.

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT'S UNREASONABLE DELAY IN DECIDING WADE'S APPEAL FROM THE DENIAL OF HABEAS CORPUS IN THIS CAPITAL CASE VIOLATES THE DUE PROCESS RIGHTS OF CALIFORNIA AND THE STATE'S ABILITY TO TIMELY ENFORCE ITS LAWS

While there are no deadlines for decisions by the federal Courts of Appeal, the delay in this case is per se unreasonable under Blodgett. The state is deprived of its sovereign power to enforce its criminal laws by unreasonable delay in deciding capital cases.

A federal stay of execution issued on this case over five years ago and remains in effect. Wade's petition for habeas corpus was denied by the district court and a certificate of probable cause issued over four years ago.

Following remand by the Ninth Circuit Court of Appeals almost two years ago, the district court held a second evidentiary hearing regarding Wade's claim

that his public defender had a conflict of interest. The district court issued an opinion finding no conflict and a certificate of probable cause was issued on March 4, 1992.

The case has been pending in the Ninth Circuit Court of Appeals since 1990, at one stage or another. Oral argument was presented to the Court of Appeals on June 16, 1993, and the case was submitted for decision.

The state cannot agree with the Ninth Circuit's February 7, 1994, conclusion that a decision in this case within 60 days is inconsistent with the court's obligations under this Court's decision in Blodgett.

The State requests a writ of mandate based on the inordinate and inexplicable delay in the Ninth Circuit deciding Wade's appeal from the denial of collateral relief.

Under the All Writs Act, 28 U.S.C. § 1651(a), the federal Courts of Appeal may issue a writ of mandate when it is "necessary or appropriate in aid of their respective jurisdictions." Will v. Calvert Fire Insurance Company, 437 U.S. 655, 661 (1978) (plurality opinion); Roche v. Evaporated Milk Association, 319 U.S. 21 (1943). This Court has long recognized this authority, and stated when it should be used.

> Applications for a mandamus to a subordinate court are warranted by the principles and usage of law in cases where the subordinate court, having jurisdiction of a case, refuses to hear and decide the controversy, or where such a court, having heard the cause, refuses to render judgment or enter a decree of in the case.

Ex Parte Newman, 81 U.S. (14 Wall.) 152, 165 (1872), emphasis added. Repeated decisions of this Court have established the rule that mandamus "will lie in a proper case to direct a subordinate

Federal Court to decide a pending cause." Insurance Company v. Comstock, 83 U.S. (16 Wall.) 258, 270 (1872); Will v. Calvert Fire Ins. Co., 437 U.S. at 662; Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 352 (1976).

For mandamus to issue, there must be a clear right to the relief sought, a plainly defined and peremptory duty on the part of the respondent to do the action in question, and no other adequate remedy is available. The petitioner must also show that the right to the writ is "clear and indisputable." Mallard v. United States Dist. Court for the S. Dist. of Iowa, 490 U.S. 296 (1989); Allied Chemical Corp v. Diaflon Inc., 449 U.S. 33, 35-36 (1980). California has demonstrated each criteria established by this Court and the Ninth Circuit's failure to act in the appeal pending before it warrants relief in this Court. LaBuy v.

Howes Leather Company, 352 U.S. 249, 259-260 (1957) (writs on mandamus may be used for "supervisory control of the District Courts by the Court of Appeals.")

1. The Ninth Circuit Court of Appeals has a duty to act in a prompt fashion in capital habeas corpus cases

There is general agreement among the Circuit Courts that "[h]abeas corpus is a speedy remedy entitled to preferential consideration." McClellan v. Young, 421 F.2d 690, 691 (6th Cir. 1970); Johnson v. Rogers, 917 F.2d 1283, 1284 (10th Cir. 1990); Van Buskirk v. Wilkinson, 216 F.2d 735, 737-738 (9th Cir. 1954). Recently, this Court stated that it would not tolerate unreasonable delay in a capital habeas corpus case, and held that such delay could be the basis of a mandamus petition.

> In a capital case the grant of a stay of execution directed to a State by a federal court imposes on that court the concomitant duty to take all

> steps necessary to ensure a prompt resolution of the matter, consistent with its duty to give full and fair consideration to all of the issues presented in the case.

In re Blodgett, 502 U.S.____, 116 L. Ed. 2d 669, 112 S. Ct. 674, 676 (1992) emphasis added.

By not promptly resolving this matter before it, the Ninth Circuit has failed in the instant case to follow the dictates in In re Blodgett.

It has failed in its "duty to take all steps necessary to ensure a prompt resolution of the matter." Blodgett, 112 S. Ct. at 676, emphasis added.

2. Mandamus is the only available means to ensure the prompt resolution of the instant case

A petition for writ of mandamus to a higher court is the appropriate action when an inferior court refuses to act on a case pending before it.

> There case be no doubt that, where a district court persistently and without reason refuses to adjudicate a case properly before it, the court of appeals may issue the writ [of mandamus] "in order that [it] may exercise the jurisdiction of review given by law."

Will v. Calvert Fire Ins., 437 U.S. at 661-662 (quoting Insurance Company v. Comstock, 83 U.S. (16 Wall.) at 270; Ex Parte Newman 81 U.S. (14 Wall.) at 165. The State of California has no other available remedy to ensure a prompt resolution of these cases except a mandamus petition.

The prejudice suffered by the State through the dilatory actions of the Ninth Circuit Court of Appeals can be addressed through a mandamus petition. This Court has recognized the prejudice suffered by a state when a federal court refuses to act promptly on a habeas corpus petition.

None of the reasons offered in the response dispels our

> concern that the State of Washington had sustained severe prejudice by the two-and-a-half year stay of execution. The stay has prevented Washington from exercising its sovereign power to enforce the criminal law, an interest we found of great weight in [McCleskey v. Zant] when discussing the importance of finality in the context of federal habeas corpus proceedings

In re Blodgett, 112 S. Ct. at 676 (citation omitted, emphasis added). As with the State of Washington in Blodgett, California is suffering a severe diminution of its sovereign power.

> Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a state to pass laws means little if the state cannot enforce them

McCleskey v. Zant, 499 U.S. ___, 113 L. Ed. 2d 517, 543, 111 S. Ct. 1454, 1469, (1991), emphasis added. The diminution of sovereignty is even greater for the State of California in this case because the federal courts have prevented the state

from enforcing its criminal laws against Wade through a habeas, appeal, remand and more habeas proceedings.

The State seeks a prompt decision of this matter.

> A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot be but war with the underlying substantive commands. . . . There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility.

McCleskey v. Zant, 113 L. Ed. 2d at 543, 111 S. Ct. at 1469 (quoting Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Har. L. Rev. at 452-453 (1963)). A court immobilized in its search for justice provides none. The Ninth Circuit Court of Appeals' duty is not to achieve absolute certainty on an issue before it, but

simply, after due consideration to decide it.

> With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821), emphasis added. Ever-delayed justice is no justice at all.

California continues to suffer prejudice based on the Ninth Circuit Court of Appeals' failure to act. Therefore, the state's right to a writ is "clear and indisputable." Mallard, 109 S. Ct. at 1822.[1] At a minimum, the Ninth Circuit

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1. The Ninth Circuit Court of Appeals has not officially responded concerning why it is taking so long to process this capital habeas corpus appeal. Any excuse based on current case load is unacceptable, and has been repeatedly rejected as a matter of law. McClellen v. Young, 421 F.2d at 691 (excessive volume of pending habeas petitions insufficient ground to justify delay in deciding them); see also Jones v. Shell, 572 F.2d 1278, 1280 (8th Cir.

Court of Appeals is continuing to violate the duty recognized by this Court in Blodgett.

3. California requests that this Court exercise its supervisorial authority and establish a 120-day time limit for ruling on appeals from denial of habeas corpus on capital cases

Although the time taken to issue a decision is generally within a court's discretion, a party may obtain a writ of mandamus when it shows that the court has abused its discretion. Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 84-85 (1970); La Buy v. Howes Leather Co., 352 U.S. at 257. In Blodgett, this Court stated that the federal courts had a duty in capital cases to "take all steps necessary to ensure a prompt resolution of the matter." 116 L.

1978) (busy court docket cannot justify 14-month delay in processing claim from date of remand). Any other result would render the holding of In re Blodgett a nullity.

Ed. 2d at 676, 112 S. Ct. at 676, emphasis added. Clearly, the Ninth Circuit Court of Appeals has failed to follow the Blodgett mandate. Moreover, no procedures or rules are in place to ensure compliance with Blodgett by the Ninth Circuit Court of Appeals. To redress this lack of guidance, respondent requests this Court order the Ninth Circuit Court of Appeal to rule within specified times on appeals in all pending capital cases once the briefing is complete or oral argument held before the court.[2/] The failure to decide

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2. A period of 120 days from the time the reply brief is due may be a reasonable guideline for decision. The local rules of the United States District Court for the Southern District of California contemplate a 120 day temporary stay "to allow newly appointed counsel to prepare and file the petition." West, Cal. Rules of Court, Federal, p. 675, LR 9.3b8c, habeas corpus and motions under § 2255.

American Bar Association recommendations suggest a one year statute of limitations (beginning "upon completion of the state direct review process") for filing all post-conviction applications in capital work. It points

a case within that time constraint would constitute a prima facie showing that the court has not complied with the Blodgett mandate, resulting in the issuance of an order to show cause. This option would establish guidelines to be followed in every case, obviating the need to relitigate the issue in every pending capital case and continuously in each individual case. Long delays in decision of capital cases are recurring in the Ninth Circuit. See, Jeffers v. Ricketts, 832 F.2d 476 (9th Cir. 1987), remanded Lewis v. Jeffers, 497 U.S. 764 (1990); Jeffers v. Lewis, 5 F.3d 1199 (9th Cir. 1992); Hamilton v. Vasquez, ___ F.2d ____, 94 DAR 1490 (9th Cir. 2/3/94).

The Blodgett mandate is clear, federal courts must establish procedures

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out this Court resolves Petitions for Certiorari in 90 days if filed during the regular term and 120 days if filed during the summer. 40 Am. Univ. Law Rev. 1, Recommendation 13 (1990).

and practices to ensure "prompt" resolution of habeas corpus petitions in capital cases. The Ninth Circuit Court of Appeals has failed to do so. Setting time limits for ruling on appeals allows some flexibility, while providing assurances to the states that the current practice of allowing capital cases to languish in the Ninth Circuit Court of Appeals for years before ruling will not be condoned or permitted.

This Court has long recognized the overriding policy of preventing federal interference with the state's fundamental interest in the administration of its own criminal justice system. Coleman v. Thompson, ___ U.S. ___, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991); McCleskey v. Zant, 11 S. Ct. 1454; Teague v. Lane, 489 U.S. 288, 309 (1989); Francis v. Henderson, 425 U.S. 536, 539 (1976).

California believes that establishing these time limits for the Ninth Circuit Court of Appeals to rule on pending capital habeas corpus appeals is not only warranted, but absolutely essential for the orderly administration of justice.

CONCLUSION

For all of the above stated reasons, the State of California respectfully requests that the Court grant a Writ of Mandate and order the Ninth Circuit Court of Appeals to render a decision on the appeal from the denial of Wade's petition for writ of habeas corpus within 120 days of the issuance of the order of this Court

DATED this 17th day of February, 1994.

Respectfully submitted,

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E X H I B I T A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MELVIN MEFFREY WADE,	No. 90-56332
Petitioner-Appellant,	D.C. No. CV-89-0173-MLR
v.	
DANIEL VASQUEZ, Warden of San Quentin; ATTORNEY GENERAL OF CALIFORNIA,	ORDER
Respondents-Appellees.	

Before: CANBY, REINHART, and TROTT, Circuit Judges

The motion of the Attorney General for a decision within 60 days is denied. The motion in this case, which involves a first petition, is inconsistent with the duty of a reviewing court in a death penalty case "to give full and fair consideration to all of the issues presented in the case." In re Blodgett, 112 S.Ct. 674, 676 (1992).

AFFIDAVIT OF SERVICE BY MAIL

Attorney:

No: 94 _____
October Term, 1994

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In re ARTHUR CALDERON,
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Prison and
DANIEL E. LUNGREN,
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I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 1100, San Diego, California 92186-5266.

I have served the within PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES SUPREME COURT OF APPEALS FOR THE NINTH CIRCUIT as follows: To William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and forty (40) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

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Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 18th day of February 1994.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, February 18, 1994.

Anne Marie Buford
ANNE MARIE BUFORD

Subscribed and sworn to before me
this 18th day of February, 1994.

Betty A. Hitchingham
Notary Public in and for said County and State

OFFICIAL SEAL
BETTY A. HITCHINGHAM
NOTARY PUBLIC-CALIFORNIA
COMMISSION # 969490
SAN DIEGO COUNTY
My Commission Exp. July 18, 1996

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Attorney General of the
State of California

APPENDICES TO PETITION FOR WRIT OF MANDAMUS

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For the Ninth Circuit
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APPENDIX A

A-1

Melvin Meffrey WADE, Petitioner

v.

Daniel VASQUEZ, Warden of San Quentin Prison, Respondent

No. CV89-0173-R

United States District Court, C.D. California

Oct. 18, 1990.

Defendant convicted of murder, torture special circumstance and heinous, atrocious, and cruel special circumstances petitioned for writ of habeas corpus. The District Court, Real, Chief Judge, held that: (1) trial counsel was not ineffective at any phase of prosecution, and (2) other claims were without merit.

Petition denied.

1. Criminal Law - 641.13(2)

Trial counsel in capital murder prosecution was not ineffective for failing to question jury panel on bias or prejudice against applying law of insanity or diminished capacity; at time of voir

dire, trial counsel had studied psychiatric and psychological material received from defendant's previous counsel and reports from psychologist and neurologist he had engaged to examine defendant, had already determined that defendant did not have psychiatric or diminished capacity defense, and did not receive information he believed might support insanity defense of disassociative disorder until after jury had been selected at which time he immediately moved for mistrial on ground he did not have chance to voir dire jury on insanity defense. U.S.C.A. Const.Amend. 6.

3. Criminal Law - 641.13(5)

Trial counsel in capital murder prosecution was not ineffective for failing to recall medical experts in sanity phase to repeat what they had already told jury in guilt phase. U.S.C.A. Const.Amend. 6.

4. Criminal Law - 641.13(7)

Trial counsel in capital murder prosecution in which disassociative disorder defense was raised was not ineffective for failing to call defendant's mother and sister in penalty phase of trial, based on his judgment that he had presented everything they could have testified to through medical experts. U.S.C.A. Const.Amend. 6.

5. Criminal Law - 641.13(2)

Loss of case file, without more, is not ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

6. Homicide - 351

California's torture-murder special circumstance is not unconstitutionally vague or overbroad and narrows class of murderers subject to death penalty. West's Ann.Cal.Penal Code § 190.2(a)(18). U.S.A.C. Const.Amend. 14.

7. Criminal Law - 1213.8(8)

Death penalty was not cruel and unusual punishment for defendant who beat and tortured his stepdaughter over extended period before killing her, even though defendant was a formerly battered child. U.S.C.A. Const.Amend. 8.

Donald J. Ayoob, Deputy State Public Defender, San Francisco, Cal. for petitioner.

Pat Zaharopoulos, Jay M. Bloom, Deputy Atty. Gen., San Diego, Cal. for Respondent.

SECOND AMENDED OPINION

REAL, Chief Judge.

Petitioner, MELVIN MEFFREY WADE (WADE) has filed a Petition for Writ of Habeas Corpus By a Person In State Custody alleging his conviction and death sentence for: murder; torture special circumstance, and heinous, atrocious and cruel special

circumstances is unconstitutional on various grounds; They are:

1. Ineffective Assistance of Counsel at Voir Dire

2. Ineffective Assistance of Counsel at Guilt Phase

3. Ineffective Assistance of Counsel at Sanity Phase

4. Ineffective Assistance of Counsel at Penalty Phase

5. Ineffective Assistance of Trial Counsel Post-Conviction and Sentence

6. Juror Misconduct/Receipt, Discussion and Consideration of Extra-Records Facts at Guilt Phase

7. Juror Misconduct/Receipt, Discussion and Consideration of Extra-Record Facts at Sanity Phase

8. Juror Misconduct/Receipt, Discussion and Consideration of Extra-Records Facts at Penalty Phase

9. Presumption of Death/"Shall" Instruction

10. Failure to Instruct to Consider All Mitigation

11. Limitation on Consideration All Mitigating Evidence Relating to Petitioner's Mental and Emotional Condition

12. Introduction of Evidence of Unadjudicated Criminal Activity

13. Skewing of Weighing Process

14. The Torture-Murder Special Circumstance Instruction

15. Denial of Meaningful Appellate Review

16. Battered Parent

17. Multiple Defects in Capital Sentencing Process

None of the 17 grounds has been supported by credible evidence and so the petition must be denied. The consideration of each grounds is as follows:

1. INEFFECTIVE ASSISTANCE OF COUNSEL AT VOIR DIRE-GUILT PHASE-SANITY PHASE-PENALTY PHASE-POST-CONVICTION AND SENTENCE

These five (5) grounds are subsumed within the consideration of trial counsel preparation and performance at the trial of petitioner. On these issues this Court must be guided by the United States Supreme Court in its decision in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Strickland, supra* at 687, 104 S.Ct. at 2064 sets forth the burden of a petitioner in establishing the ineffective assistance of counsel as:

> ". . . First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive defendant of a fair trial, a

> trial whose result is reliable. Unless a defendant makes *both* showings it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." (emphasis added)

Petitioner has unfortunately failed on both aspects of the *Strickland, supra* test. Petitioner was represented at trial by S. Donald Ames (AMES). At the time of his appointment to represent WADE, AMES had been engaged in the practice of criminal law for nine (9) years--six of those nine years as a County Public Defender and three years in private practice specializing in criminal defense. Before his appointment to represent WADE he had defended one Steven Anderson in Capital trial. (See *People v. Anderson*, 38 Cal.App.3d 952, 113 Cal.Rptr. 729 (1974)). Judge Ben Kayashima, the trial judge in the WADE trial described AMES as "one of the top ten criminal defense attorneys in the county" and "one out of

five qualified to try death penalty cases."

WADE had been represented by one Daniel Greenberg before AMES' appointment. Greenberg had made and lost a change of venue motion. Greenberg also had WADE examined by a psychiatrist and psychologist. This information was given by Greenberg to AMES with the comment that the case was an absolute loser and he--Greenberg--did not want his name associated with a loser.

A. VOIR DIRE

[1] WADE claims that AMES should have questioned the jury panel on bias of prejudice against applying the law of insanity or diminished capacity. But the problem with WADE'S position is that at the time of voir dire, AMES, after studying the psychiatric and psychological material he had received from Greenberg and the reports he received from the

psychologist and neurologist he had engaged to examine WADE, had already determined WADE did not have a psychiatric or diminished capacity defense. It was only after the jury had been selected that AMES received some information that he believed might support an insanity defense of disassociative disorder. Immediately AMES moved for a mistrial on the ground he did not have a chance to voir dire the jury on an insanity defense. The mistrial motion was denied by the trial judge. There was no constitutional error.

B. GUILT PHASE

[2] WADE claims that AMES failed to make a sufficient investigation and to prepare prior to trial. In making these assertions WADE urges this court to make that determination based on the time AMES requested to be paid under his appointment and the time spent by AMES' investigator one D.J. Alton (ALTON). AMES

claimed 12.5 hours and ALTON claimed he met with AMES on 35 different dates. Time spent on the preparation of any matter cannot be the deciding criteria for the constitutional adequacy or inadequacy of the performance of one charged with the duty to competently represent a client. Experience tells us that what may take one person an hour to prepare may take others 5, 10 or 20 hours to accomplish the same level of preparation. In some cases, no matter how many hours are spent, competency in the subject matter is never accomplished. Moreover, AMES testified that he spent considerably more hours that he claimed for reimbursement purposes. He explained that San Bernardino County was rather niggardly in the payment of counsel time and so he didn't bother to claim all the hours he spent working on WADE'S trial. The County's attitude on counsel payments in appointive cases was

corroborated by Judge Ben Kayashima. AMES' testimony is credible and he should not be branded incompetent on the basis of his compensation claim.[1]

AMES tried WADE'S case representing a defense he judged to be his only defense--disassociative disorder. He knew the facts of the murder well and could not find any factual dispute with the details of the events surrounding the murder. His judgment that the only defense he could present was a disassociative disorder defense should not

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1. Thomas McDonald, WADE'S expert on trial competency testified to necessary preparation for WADE'S trial. Taking Mr. McDonald's testimony at face value he describes a "perfect" trial preparation with what would add up to thousands of hours of preparation. He testified to such a "perfect" preparation in a capital case he tried involving 16 counts of murder. (See *People v. Randy Steven Kraft*, Orange County No. C-52776 appeal pending California Supreme Court No. S013197). The jury is that case returned death penalty verdicts in all 16 counts. Witherspoon's standard is not *perfection* but constitutional adequacy.

be deemed incompetence. The defense, if any he had, was presented well and competently by an experienced criminal lawyer. The result of the guilt phase was tragic to WADE but no more tragic than the facts that brought him to trial for the murder of the daughter by a prior marriage of his wife, Irabell "Cookie" Strong.

C. SANITY PHASE

[3] AMES had presented all the psychiatric testimony on the disassociative disorder defense in the guilty phase of the trial. He explained that strategy was adopted because of the otherwise lack of facts that could be used as defense. More importantly AMES wanted the jury to learn as early as possible about the fact that they were, as he put it, "dealing with a very sick human being."

Having put WADE'S social history in through the medical experts, AMES made

the judgment call that he had presented to the jury a complete picture of his client.

WADE faults AMES for not presenting evidence of his use of PCP or the fact that he was a battered child. Both were produced in evidence through various witnesses during the trial. AMES did not want to press a defense based on the use of PCP because, in his judgment, that defense tactic would prove useless in San Bernardino County given the facts of the murder. Moreover, there was no evidence to support recent use of PCP. What evidence WADE indicated was available was incompetent hearsay.

Having given what in effect was his strongest joint guilt and sanity defense, AMES cannot be faulted for not recalling the medical experts to repeat what they had already told the jury. AMES did not fail the *Strickland* test, supra in the sanity phase.

D. PENALTY PHASE

[4] WADE faults AMES for not calling WADE'S mother and sister in the penalty phase of his trial. AMES presented everything WADE'S mother or sister could have testified to through the medical experts. WADE'S criticism of that method of presenting "mitigating evidence" is that "the failure to produce these witnesses diminished the impact of such evidence." AMES had decided from his talk with WADE'S mother and the information he was given by his investigator about the testimony of WADE'S sister that the testimony of WADE'S mother and sister would have been at odds with each other. He decided--that he would not use them in the penalty phase. Certainly where the evidence would be repetitive, who to use and how it should be presented to the jury is judgmental in every respect. As an experienced trial lawyer, AMES made that

judgment. The fact that he was not successful in his attempts to spare WADE'S life does not measure his competency or the expression of that competency in defense of WADE.

The California Supreme Court held on direct appeal, *People* v. *Wade*, 44 Cal.3d 975, 244 Cal.Rptr. 905, 750 P.2d 794 (1988), that AMES' argument was a reasonable and tactical one, aimed at gaining the jury's sympathy for his client.

The penalty phase of a capital case is largely the persuasive effects of the testimony of the defendant himself in asking for the mercy of the jury and the advocacy of counsel for a defendant to be persuasive enough to overcome the facts of the murder itself. To attempt to justify the fact of the murder AMES decided to continue his "Melvin didn't do it" defense of disassociative disorder. If he could

raise a "maybe?" in the minds of the jurors his tactic might succeed. He didn't and it didn't. He cannot be faulted for the jury's rejection of his argument since the murder could not be described in any other way than atrocious and the evidence was overwhelming of the violence with which the murder had been committed. AMES had to attempt to convince the jury that "someone else" was beating to death a 10 year old child over a period of 24 hours. The only someone AMES had available to him was Othello, his other self. AMES could not have convinced this jury to spare WADE'S life because he was drug or alcohol crazed or a "battered child" adult. The California Supreme Court correctly decided that AMES was reasonable in begging for sympathy for his client. It was all he had.

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E. POST CONVICTION AND SENTENCE

[5] WADE'S claim on this issue appears to be focused on some failure of AMES to "preserve the file so it could be used by petitioner or subsequent counsel in litigating the constitutional claims presented by this petition." This appears to be based on the fact that AMES moved his offices in July 1985 and the trial file in WADE'S case was lost during that move. Without more, the loss of a file can hardly raise itself to any violation of the Sixth Amendment right to the effective assistance of counsel. Loss of a file without more is not constitutional error. WADE has shown no prejudice by reason of the loss of the file.

2. JUROR MISCONDUCT/RECEIPT, DISCUSSION AND CONSIDERATION OF EXTRA--RECORD FACTS AT GUILT PHASE--SANITY PHASE--PENALTY PHASE

For whatever purpose was in the mind of counsel for WADE the claimed juror

misconduct has been separated into three separate claims. Together they make only one claims, i.e. juror misconduct by receipt, discussion and consideration of extra-record facts. No credible evidence supports that claim for any phase of the trial.

To support this claim WADE was given the opportunity to send interrogatories to the jurors to determine what facts could be elicited to support his claim. None were sent and none were presented at the hearing of this petition. WADE has totally failed on these claims. What evidence WADE did present could not support his claim of juror misconduct.

3. PRESUMPTION OF DEATH/"SHALL" INSTRUCTION

The trial court's instructions were fully reviewed by the California Supreme Court on direct appeal *People v. Wade*, 44 Cal.3d 975, 244 Cal.Rptr. 905, 750 P.2d 794 (1988). The finding of

adequacy of the court's instructions is well supported by the record and the law as applied by the Supreme Court of California. That determination may not be disturbed on consideration of this petition (See *Boyde v. California*, 494 U.S. ___, 110 S.Ct. 1190, 108 L.Ed.2d 316, *reh'g denied*, 494 U.S. ___, 110 S.Ct. 1961, 109 L.Ed.2d 322 (1990)).

4. FAILURE TO INSTRUCT TO CONSIDER ALL MITIGATION

The trial court's instructions on this issue were reviewed by the California Supreme Court on direct appeal in *People v. Wade, supra*, 44 Cal.3d at 986, 244 Cal.Rptr. 905, 750 P.2d 794. The record and the law support the California Supreme Court's decision in this respect and it need not be disturbed on consideration of this petition. (See *Boyde, supra.*)

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5. LIMITATION ON CONSIDERATION OF MITIGATING EVIDENCE RELATING TO PETITION'S MENTAL AND EMOTIONAL CONDITION

Again *People v. Wade, supra*, 44 Cal.3d at 997, 244 Cal.Rptr. 905, 750 P.2d 794, answers this ground as set forth above (See *Blystone v. Pennsylvania*, 494 U.S. ___, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990)). Again, this court agrees with the California Supreme Court's factual and legal findings on this issue.

6. INTRODUCTION OF EVIDENCE OF UNADJUDICATED CRIMINAL ACTIVITY

The California Supreme Court in *People v. Wade, supra*, 44 Cal.3d at 989-992, 244 Cal.Rptr. 905, 750 P.2d 794, on direct appeal analyzed and concluded that this evidence was admissible. That analysis is constitutionally sound and should not be upset on consideration of this petition. This evidence was admitted for a limited purpose under California

law, and the trial judge gave the jury an appropriate limiting instruction.

7. SKEWING OF WEIGHING PROCESS

WADE raised no constitutional infirmity in relation to the consideration of this issue. To the extent Wade asserts a constitutional claim because the trial court did not instruct the jury that it must find beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances and the death was the appropriate punishment, his claim his without merit. The Ninth Circuit has rejected a similar argument, noting that the "United States Supreme Court has never stated that a beyond-a-reasonable-doubt standard is required when determining whether a death penalty should be imposed." *Harris v. Pulley*, 692 F.2d 1189, 1195 (9th Cir. 1982), *rev'd on other grounds*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984).

8. THE TORTURE-MURDER SPECIAL CIRCUMSTANCE INSTRUCTION

[6] The analysis of the California Supreme Court in *People* v. *Wade*, supra, 44 Cal.3d at 993-994, 244 Cal.Rptr. 905, 750 P.2d 794 on direct appeal from WADE'S conviction concludes there is no constitutional infirmity because "there is no reasonable likelihood that the jury was misled on this issue." A review of the record led on this issue." A review of the record leads this court to the same conclusion.

In addition, this court agrees with the California Supreme Court's reasoning in *People* v. *Wade*, supra, 44 Cal.3d at 993, 244 Cal.Rptr. 905, 750 P.2d 794, and *People* v. *Davenport*, 41 Cal.3d 247, 270-271, 221 Cal.Rptr. 794, 710 P.2d 861 (1985) that the Torture-murder special circumstance is not unconstitutionally vague or overboard, and does narrow the

class of murderers subject to the death penalty.

9. DENIAL OF MEANINGFUL APPELLATE LATE REVIEW

There is nothing in the record to support a claim of denial of meaningful appellate review. The California Supreme Court's opinion in *People* v. *Wade*, supra demonstrates a thorough analysis of the record, the facts, and the law.

10. BATTERING PARENT

[7] WADE contends that is would violate the Eighth Amendment ban on cruel and unusual punishment to sentence him, a formerly battered child, to death for killing his child in the course of disciplining her. This court adopts the findings of fact and law set forth by the California Supreme Court in *People* v. *Wade*, supra, 44 Cal.3d at 999, 244 Cal.Rptr. 905, 750 P.2d 794 ("The record indicates that ... defendant beat and tortured his stepdaughter over an extended

period, having ample time to reflect upon the nature of his acts. Under these facts we cannot hold that the punishment imposed is disproportionate to his individual culpability").

11. MULTIPLE DEFECTS IN THE CAPITAL SENTENCING PROCESS

This claim is, in essence, a claim that all of the other issues raised, in the aggregate, make WADE'S sentence unconstitutional. Since all other issues raised by WADE have been rejected, this claim must also fail.

WADE raises an issue outside the petition that this court should have disqualified the State Public Defender's Office due to a claimed conflict of interest in that Barry P. Helft (HELFT), a deputy State Public Defender, was aware of the evidence that would prove AMES incompetent.

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The issue is totally bogus. First, (HELFT) did not appear in this case until the motion to disqualify was brought by the State Public Defender. Second, the State Public Defender totally misconstrues the law and ethical considerations of conflict of interest. HELFT, if anything, was adverse to AMES and not to any client of the State Public Defender. There is absolutely no reason why HELFT could not have testified on behalf of WADE on the incompetency of AMES if he had such evidence.

The filing of the motion to recuse was simply an attempt to delay the hearing on the petition. That was obvious from the late entry of HELFT into the matter and totally frivolous arguments on the supposed conflict of interest with "his client."

The so-called discovery by respondent of the nature of HELFT'S

testimony would, in the ordinary course of progress of any litigation, have been discoverable either by deposition or written interrogatory. The refusal of the State Public Defender to disclose to the State the information HELFT supposedly had of the incompetence of AMES in the defense of WADE left the court with no alternative but to deny the motion. Even assuming HELFT'S "former personal relationships as a relative by marriage of the witness,"[2] nothing could be more inapposite to the ethical standards controlling lawyer conduct in considering the lawyer's conflict of interest to his client. HELFT owed no duty to AMES to refrain from any investigation or presentation of facts that could be of benefit to WADE.

Helft was not disqualified from the case because of any conflict of

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2. HELFT offered no more than a nebulous claim of "relative by marriage."

interest. What HELFT was advised was that if he were going to be a witness, particularly as set forth by ethical standards, he could not be part of the conduct of the trial since his credibility would become an issue. HELFT was never called as a witness but did sit at counsel table throughout the hearing. Nothing presented to this court could be deemed to have disqualified the office of the California State Public Defender.

This opinion shall be deemed to be the findings of fact and conclusions of law required by Federal Rules of Civil Procedure Rule 52. The court further adopts the facts and the law of *People* v. *Wade*, 44 Cal.3d 975, 244 Cal.Rptr. 905,750 P.2d 794 (1988).

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MELVIN MEFFREY WADE Petitioner, vs. DANIEL VASQUEZ, Warden, San Quentin Prison, Respondent.	CASE NO. CV 89-0173-R OPINION AND ORDER

This matter was set for hearing on August 31, 1992 before the court, the Honorable Manuel L. Real, Chief District Judge Presiding: (1) Evidentiary Hearing to determine the existence of an alleged conflict of interest between the State Public Defender (SPD) and Melvin Meffrey Wade (WADE).

Having considered the record, the submissions by both parties, the testimony elicited during the hearing, and the oral arguments presented at the

hearing, the Court finds and orders as follows:

I.

INTRODUCTION

WADE, represented by the SPD, filed a writ of habeas corpus on December 11, 1989. An evidentiary hearing was ordered to be held February 27, 1990 on the issue of the adequacy of counsel representing WADE at trial. That hearing was stayed by the Ninth Circuit. The hearing was reset for May 22, 1990.

On May 21, 1990, the day before the evidentiary hearing was scheduled to proceed, one of the petitioner's counsel, Barry Helft (HELFT), moved to withdraw due to an unspecified reason creating a conflict of interest with WADE'S interests. Insisting on an in camera hearing without the presence of the attorney general, HELFT refused to provide the basis for the conflict in a closed

courtroom in the presence of respondent's counsel, the deputy attorney general. Out of abundance of caution, HELFT was permitted to withdraw as counsel. This court permitted him to remain at counsel table to assist his co-counsel, Don Ayoob (AYOOB), during the evidentiary hearing, and to testify concerning his claimed personal knowledge of matters going to the adequacy of counsel issue.

After a three day evidentiary hearing, the petition was submitted to the court. An opinion and order denying petitioner's requested relief is found at Wade v. Vasquez, 745 F.Supp. 1547, as modified, Wade v. Vasquez, 752 F.Supp. 931 (C.D.Cal. 1990).

On appeal to the Ninth Circuit, petitioner asserted that the alleged conflict existed prior to the evidentiary hearing. In response to the Ninth Circuit's remand order, this court held

the August 31, 1992 evidentiary hearing to determine whether a conflict existed between the SPD and petitioner as of May 22, 1990.

II.

FINDINGS OF FACT

At the evidentiary hearing held August 31, 1992, petitioner presented three witnesses who all told a similar tale. Respondent generally agrees with the fact presented, but disagrees with the factual and legal inferences the SPD draws form these facts.d

A. 1989 - EARLY FEBRUARY, 1990

Michael Pescetta (PESCETTA) was supervisor of death penalty litigation for the SPD during 1989 and 1990. PESCETTA hired HELFT on January 2, 1990, to assist the SPD in representing petitioner. HELFT had significant experience in death penalty and habeas corpus litigation, and PESCETTA claimed HELFT was slated to be

lead counsel in the representation of WADE. HELFT was assigned by PESCETTA to represent WADE on January 22, 1990 even though the pleadings filed in this court did not show him in any capacity nor did he appear in court on any hearing until the motion to withdraw.

Soon after he was assigned to the case, HELFT realized that WADE'S trial counsel was S. Donald Ames (AMES). AMES was HELFT'S former father-in-law, though the two did not have even an avuncular relationship during his marriage to AMES' daughter Jill or thereafter. HELFT testified that he saw AMES at most a dozen times, in passing, over a period spanning close to ten years, before and during his marriage to AMES' daughter Jill. They never spent holidays together; nor did anything together that would bespeak of any familial relationship. HELFT was married to AMES' daughter, Jill for about

6 years culminating in 1977. The couple had been divorced for twelve years at the time of HELFT'S assignment to represent WADE. Since their divorce, the contact between HELFT'S assignment to represent WADE. Since years, the contact between HELFT and his former wife, Jill, has been at best sporadic. HELFT told PESCETTA about his former marriage, and his "in-law" relations with AMES. They each claim to have researched the law of conflicts and determined in late January or early February, 1990 that no conflict existed due to this prior familial relationship.

B. EARLY FEBRUARY TO MAY 20, 1990

HELFT continued to work on the case. After reading the state transcripts in late April or early May, 1990,[3] HELFT, at a time not at all clear to the court,

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3. The time records submitted indicate that HELFT billed over 500 hours on the WADE case in the four months ending May 21, 1990.

but during HELFT'S assignment, somehow suddenly recalled that he had learned from his former wife's aunt, that AMES had abused Jill emotionally, and maybe even physically, when she was a child; that she had been placed in a foster home; and that she had been living with the aunt, presumably to escape the abuse by her father, when he courted her. This evidence even if true, involves multiple hearsay and strains any relevancy consideration for AMES' conduct of WADE'S case some 15-20 years later.

The testimony of all three witnesses indicates that HELFT reported this information to PESCETTA as soon as he allegedly remembered it, and then proceed to determine whether such information would be admissible as evidence to confute AMES' defense to petitioner's ineffective assistance of counsel claim. (See Strickland v. Washington, 466 U.S. 668,

(1984).) HELFT and AYOOB properly determined that the evidence would be inadmissible. HELFT had no personal knowledge of any abuse, and whatever "knowledge" he had was hearsay, and probably double hearsay. The focus on admissibility indicates that both attorneys were poised to exploit the information to WADE'S advantage without concern for any later supposed conflict of interest. HELFT'S research concerning admissibility of this admittedly hearsay evidence seems to this privacy, or to any alleged divided loyalty between his former wife and his present client. If HELFT were so conflicted, it is incredible that he would spend time in research of the admissibility of the information the he now claims he could not assist in disclosing.

PESCETTA testified that he believed the admissibility question was

not the threshold issue. Rather, according to PESCETTA, the SPD'S focus at this point was on the question of whether HELFT had a conflict of interest which precluded him and the SPD from representing WADE. PESCETTA now curiously claims that because HELFT gained this information through conversations with his former wife's aunt, any investigation of such information would, a fortiori, require an investigation into HELFT'S personal life. PESCETTA'S concern of an investigation of HELFT'S personal life is incredible. PESCETTA'S belief that no one under the direction of the SPD would be able to conduct such an investigation of one of, in PESCETTA'S words, "their own," and that therefore the entire agency was conflicted is totally unsupported in law or logic. If true, the investigation would only have disclosed details about AMES' background and character, and

specifically, it would have revealed private facts about his daughter Jill's childhood, if there were any private facts to reveal. There would be no cause to investigate HELFT'S married life with AMES' daughter. This Court finds it difficult to comprehend how any private information about HELFT would come to light during such an investigation. He did not know AMES well enough to have been subject of his purported abuse, and his former wife was an adult, beyond AMES' control, by the time HELFT married her. Moreover, no indication of this so-called inability to investigate "one of our own" was ever made to this Court or suggested in any way by any concern expressed during the research done by HELFT and PESCETTA. In light of this evidence recent fabrication takes on realistic possibilities.

The conflict theory was strengthened in PESCETTA'S belief the HELFT was not disclosing the entire story, and by his belief the HELFT'S judgment was impaired by the conflict. It is interesting to note, however, that PESCETTA with his professed concern for HELFT'S privacy never even bothered to ask HELFT if he could or would conduct such an investigation, or if such an investigation would make it impossible for him to represent WADE. PESCETTA has given no reasonable explanation as to how he came to these beliefs.

Despite the failure to determine the answers to these simple and obvious questions, PESCETTA called a "conflict meeting" with select employees of the SPD and Michael Millman (MILLMAN) of the California Appellate Project (CAP). MILLMAN was invited to give his opinion as to whether a conflict between HELFT and

WADE precluded the SPD'S further representation of WADE.

It is at this point that the tale takes on absurd dimensions and makes a mockery of the importance of the writ of habeas corpus and the law of conflicts of interest between attorney and client. MILLMAN, like PESCETTA, never once asked HELFT about his ability to investigate AMES' background and character, or whether, if HELFT could not so investigate, he could abide such and investigation conducted by another designee either within or outside of SPD. Rather, MILLMAN testified on cross-examination that he "perceived" that HELFT was a burden with a conflict of interest. He described it in these words:

A. "He sat on the side. He didn't talk very much. His body language was one of discomfort and

displeasure that the [conflict discussion] was taking place.

Q. What body language did you observe since we were not at the meeting, sir?

A. Tucked, body sort of tucked inward, his head down, a disgruntled expression on his face."

MILLMAN also testified that he had probably spent no more than ten hours with HELFT at different times in his entire life. Yet, he was able to discern within HELFT a legal conflict of interest without the benefit of asking the man what he felt or believe, depending only on his ability to interpret "body language." Every litigant would wish for the ability to discern the intent and motivation of strangers, and ultimately make factual and legal conclusions after a cursory summation of body language, exhibited

during a legal meeting. This is blatantly absurd.

The conclusion drawn at the end of the conflict meeting was that HELFT had a conflict of interest and could not proceed with the case. The conflict went so deep, PESCETTA believed, that the entire office of the SPD also had to withdraw, leaving WADE without counsel on the eve of his federal habeas corpus evidentiary hearing. It should be noted that HELFT left the meeting before it was over. This Court wonders if he left in disgust at the patently transparent tactic his superiors were thrusting upon him, possibly endangering his professional reputation.

What is clear is that the claim of conflict of interest was no more that a tactic to delay the evidentiary hearing. PESCETTA and MILLMAN were apparently in some dream world of creating a conflict

out of he evanescence of divining body language and unasked questions.

C. MAY 21, 1990

Acting pursuant to the "conflict" determination, the day before the evidentiary hearing was scheduled proceed, HELFT filed and argued a withdrawal motion. This was the first submission to include HELFT in the counsel caption of any pleading or paper during the period of the pending petition. AYOOB signed and argued every pleading, motion, or paper submitted in this matter. Included in the "conflict" motion was the declaration of PESCETTA in which he averred to this Court that HELFT was the only attorney qualified to represent WADE in the evidentiary hearing.[4] It was clear

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4. His testimony on August 31, 1992 calls into question the truthfulness of the declaration. On August 31, he stated that 60 of 65 attorneys employed by the State Public Defender had capital experience, and a couple had non-capital federal habeas

to this Court during the prosecution of the petition and hearing that AYOOB exhibited the ability to handle the entire matter by himself.

HELFT refused to explain the factual basis for the motion to withdraw in open court. His explanation now is that he was afraid "that if he had done it in open court in the presence of the attorney general, that the information that I gave would be immediately relayed to AMES. I believed based upon my observations of him, brief though they were, and basically based upon what my ex-wife had told me, that if he was aware of

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experience. Certainly the State Public Defender's office has more than one attorney experienced enough in trial practice to conduct an evidentiary hearing in federal court. To suggest otherwise is to ignore the reality that Public Defenders are criminal trial lawyers. Moreover AYOOB'S representation of WADE to and through the evidentiary hearing showed his competency to handle the issues presented.

what my disclosures were that he would take it out on WADE." The extra sensory perception of the players in this "conflict" motion totally escapes this Court. This is as ridiculous a scenario as has ever been presented to this Court. HELFT created this "risk in his own mind. He "perceived" it much the way MILLMAN "perceived" the conflict of in HELFT. This court does not credit Mr. HELFT'S testimony that he believed AMES would "take it out" on WADE . AMES was hardy in any position to do such an incredible thing. HELFT and Jill, and not WADE, are the parties disclosing the embarrassing allegations claimed by HELFT. WADE and his relationship to his lawyers has nothing to do with this aspect of his habeas corpus petition. The trial of WADE was long over and AMES' conduct was to be measured objectively and largely by the record. As a lawyer, AMES has to know

that he could not perjure himself to "take it out on WADE." To this Court's knowledge, there has been no suggestions that AMES has ever threatened any of the witnesses or WADE. The SPD should spend more time asking obvious questions, and less time "perceiving" unsupported conclusions.

Moreover, there is no basis in fact for such a "fear." WADE is on death row. AMES no longer represents WADE. AMES did not exactly have easy access to WADE or WADE'S witnesses. The Attorney General had no knowledge of what WADE could or would offer in support of WADE`S ineffective assistance of counsel claim. WADE is probably in the safest environment possible with respect to any dangers or threats form the outside world. Did HELFT believe that AMES would somehow make an attack on WADE in prison? The absurdity of the question indicates the

absurdity of HELFT'S Claim. This Court would have found a somewhat more plausible excuse if HELFT had feared for his ex-wife's life, in that AMES could find her and harm her; and in that it was she, who could, if admissible, testify on the childhood abuse. Even still, this certainly would not be sufficient to rise to the level of any legal or logical conflict of interest between WADE and the SPD. If anything, it had to be a convergence of interest - all parties concerned would want the true AMES exposed for the world to see, before he could wreak any more claimed harm.

At the motion to withdraw, the SPD could cite no rule of professional conduct violated by this situation. The SPD has yet to cite any authority to advance its unique theory of the law of conflict of interest between attorney and

client. HELFT owed no duty of loyalty to AMES or to Jill.

Out of an abundance of caution, this Court granted HELFT'S motion to withdraw direct participation in the hearing but denied it as to the SPD. HELFT was permitted to remain at counsel table to assist AYOOB, who had been preparing the case from its outset. The Court included the option that HELFT could testify as a witness if the information he had was either relevant or otherwise admissible. AYOOB'S advocacy was zealous and competent. HELFT assisted throughout the hearing from counsel table. The hearing lasted three days. WADE'S case was not harmed in any way by AYOOB'S performance at the evidentiary hearing.

III.

CONCLUSION

Given the absence of any duty of loyalty owed by HELFT to either AMES, his

former father-in-law, or to Jill, his former wife, there can be no basis for finding a conflict of interest in HELFT'S or the SPD'S representation of WADE. Even if this Court could find a conflict, which it cannot, in HELFT'S hearsay knowledge, this Court cannot find that the SPD had such a conflict.

This court would be the first to step up to vote against the death penalty. To put personal philosophy ahead of judicial duty is not the function of a judge sworn to uphold the law and do justice. To act as an advocate by subverting the function of the writ of habeas corpus I cannot and will not do. I heard the admissible evidence at the hearing on May 22, 23 and 24, 1990 and made my ruling on the petition. It is that judgment that should be the focus of the appeal in the case. I stated in my opinion, Wade v. Vasquez, 752 F.Supp 931

(C.D. Cal. 1990) that I believed that the conflict issue was bogus and interposed only for the purpose of delay. This hearing has not changed what was obvious then.

The motion was denied then and upon reconsideration ordered by the Court of Appeals in denied again.

DATED: December 9, 1992.

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

Filed - December 9, 1992

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MELVIN MEFFREY WADE, Petitioner-Appellant, v. DANIEL VASQUEZ, Warden of San Quentin; ATTORNEY GENERAL OF CALIFORNIA, Respondents-Appellees.	No. 90-56332 D.C. No. CV-89-0173-MLR ORDER

Before: CANBY, REINHART, and TROTT, Circuit Judges

The motion of the Attorney General for a decision within 60 days is denied. The motion in this case, which involves a first petition, is inconsistent with the duty of a reviewing court in a death penalty case "to give full and fair consideration to all of the issues presented in the case." In re Blodgett, 112 S.Ct. 674, 676 (1992).

Filed, February 7, 1994

AFFIDAVIT OF SERVICE BY MAIL

Attorney:

No: 94 _____
October Term, 1994

DANIEL E. LUNGREN
Attorney General of
the State of California
PAT ZAHAROPOULOS,
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P.O. Box 85266
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In re ARTHUR CALDERON,
Warden of San Quentin
Prison and
DANIEL E. LUNGREN,
Attorney General of the
State of California

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 1100, San Diego, California 92186-5266.

I have served the within APPENDICES TO PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES SUPREME COURT OF APPEALS FOR THE NINTH CIRCUIT as follows: To William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and forty (40) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

Michael R. Levine
Assistant Federal Defender
851 S.W. 6th Ave., Ste. 1375
Portland, OR 97204

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221 Main Street, 10th Floor
San Francisco, CA 94105

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 1st day of March 1994.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, March 1, 1994.

Anne Marie Buford
ANNE MARIE BUFORD

Subscribed and sworn to before me
this 1st day of March, 1994.

Michelle R. Renaud
Notary Public in and for said County and State

OFFICIAL SEAL
MICHELLE R. RENAUD
NOTARY PUBLIC-CALIFORNIA
COMMISSION # 977280
SAN DIEGO COUNTY
My Commission Exp. November 8, 1996

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Supreme Court, U.S.
FILED
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(3)

No. 93-1418

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

In re ARTHUR CALDERON,
Warden of San Quentin Prison,
and DANIEL LUNGREN, Attorney General
of the State of California

RESPONDENT WADE'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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17 pp

QUESTIONS PRESENTED

1. Should this Court issue a writ of mandamus where the court of appeals judges have already decided the underlying appeal and the state has failed to establish it is "clearly and indisputably" entitled to the writ?

2. Should this Court establish a rule requiring the Ninth Circuit to issue opinions in death penalty cases within 120 days of oral argument when such a rule would conflict with the duty of the court of appeals to give "full and fair consideration to all the issues presented in the case," and substantially disrupt the orderly administration of justice?

LIST OF PARTIES

Warden Arthur Calderon and California Attorney General Daniel Lungren are petitioners. Respondents are the United States Court of Appeals for the Ninth Circuit, and Circuit Judges William C. Canby, Jr., Stephen Reinhardt and Stephen S. Trott. Melvin Wade is the appellant in the habeas corpus appeal underlying this mandamus proceeding. Real party in interest and respondent Wade is represented below by special counsel, who was appointed by the Ninth Circuit on the singular issue of whether principal counsel had a conflict of interest, and who has been ordered by this Court to respond to the petition. Respondent Wade's undersigned principal counsel submits this Brief in Opposition to aid the Court in understanding the complexity of the underlying record.

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TABLE OF AUTHORITIES

Cases	Pages
In re Blodgett 502 U.S. ___, 116 L.Ed.2d 669 112 S.Ct. 674 (1992)	5,7
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Wade v. Vasquez 752 F. Supp. 931 (C.D. Cal. 1990)	1,5
Wade v. Vasquez No. 90-56332, 1994 U.S. App. Lexis 10762	1
Will v. Calvert Fire Insurance Co. 437 U.S. 655 (1978)	4
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OPINIONS BELOW

Petitioner accurately recounts the dates of the opinions below except that on May 16, 1994, the Court of Appeals for the Ninth Circuit decided Wade v. Vasquez, No. 90-56332, 1994 U.S. App. Lexis 10762.

STATEMENT OF THE CASE

Respondent Wade filed his habeas corpus petition in federal district court on January 11, 1989. The district court ordered Wade to return to state court to exhaust his state remedies; on March 22, 1989 Wade filed a habeas corpus petition in state court. While that petition was pending, petitioners herein sought and obtained a new execution date of June 23, 1989. The state petition was denied on June 21, 1989, and on June 22, 1989, the district court stayed Wade's execution.

Respondent Wade filed his first amended petition in district court on August 8, 1989. After the answer, traverse and numerous pre-trial motions, an evidentiary hearing commenced on May 22, 1990 in district court. The petition for writ of habeas corpus was denied, Wade v. Vasquez, 752 F.Supp. 931 (C.D. Cal. 1990), the judgment was entered on October 19, 1990, and on November 16, 1990, Wade filed a timely notice of appeal. The district court issued and then filed the Certificate of Probable Cause on March 4, 1991.

After designation of the record, on January 22, 1991, the court of appeals ordered the transcripts filed by February 4, 1991. The court of appeals set a briefing schedule and

calendared oral argument for June 13, 1991. On or about February 6, 1991, respondent Wade moved for appointment of independent or special counsel in the court of appeals to present the issue of principal counsel's conflict of interest. The complete transcripts of the designated district court proceedings were not filed until April 12, 1991, and on April 15, 1991, the district court clerk provided uncorrected, and in large part unintelligible, transcripts to the parties. The court of appeals ordered on May 30, 1991, that a corrected record be provided and set a revised briefing schedule. After briefing by the parties, on May 31, 1991, the court of appeals appointed special counsel to assist respondent Wade in the presentation of his claim that principal counsel had a conflict of interest. It was not until sometime between August 5 and August 15, 1991, that undersigned counsel finally obtained the complete, corrected, certified transcripts.

On or about November 19, 1991, respondent Wade's 117-page opening brief on appeal was filed in the court of appeals. Briefing was completed by all counsel on or about February 13, 1992. On April 21, 1992 the court of appeals remanded the matter and directed the district court to receive evidence on respondent Wade's claim that principal counsel had a conflict of interest. After evidentiary proceedings, the district court order holding that there was no conflict of interest was entered on December 14, 1992. The district court issued a certificate of probable cause.

Supplemental briefing by all parties, raising additional issues joined in by two amicus curiae, was completed April 28, 1993; oral argument was presented to the court of appeals on June 16, 1993. On February 7, 1994 the court of appeals denied petitioner's motion for a decision within 60 days. On February 18, 1994 petitioner served the petition for writ of mandamus on respondent's principal and special counsel. By letter dated April 21, 1994, the Clerk of this Court directed special counsel to respond to the petition for mandamus on or before May 21, 1994. On May 16, 1994 the court of appeals rendered its decision in respondent's appeal.

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REASONS FOR DENYING THE WRIT

I

PETITIONERS HAVE FAILED TO DEMONSTRATE THAT THEY ARE CLEARLY AND INDISPUTABLY ENTITLED TO ISSUANCE OF THE WRIT

Respondent Wade respectfully suggests that the act petitioner seeks to compel by the writ of mandamus has already taken place. Therefore, the petition is moot.

Moreover, the petition fails to demonstrate that the court of appeals has refused to decide the underlying appeal.[1] See, Will v. Calvert Fire Ins. Co., 437 U.S. 655, 662 (1978). Rather than accurately and completely recount the procedural history of respondent Wade's federal habeas corpus litigation, petitioner conspicuously omits significant events in both the district court and court of appeals. Utilizing the misleading impression of periods of inactivity based upon these omissions, petitioner accuses the court of appeals of "dilatory actions" in a conclusory argument based solely upon hyperbole.

An accurate representation of the proceedings below belies petitioner's unfounded accusation that the court of appeals has refused to adjudicate the multiple constitutional claims in respondent Wade's first federal habeas corpus petition. Rather, the record demonstrates a conscientious and deliberate effort by the court of appeals to promptly resolve the matter "consistent with its duty to give full and fair consideration to

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[1] Respondent Wade's principal counsel hereby joins in special counsel's response and incorporates by this reference all arguments raised therein.

all of the issues presented in the case." In re Blodgett, 502 U.S. ___, 116 L.Ed.2d 669, 112 S.Ct. 674, 676 (1992).

Petitioner attempts to utilize this case to seek further relief from what petitioner claims to be the recurring problem of delays in capital cases. Although respondent Wade believes this to be an illusory claim, even were it not, respondent's appeal does not present a proper vehicle for resolving petitioner's claim. Contrary to the inaccurate impression created by petitioner's Statement of the Case, (Pet. at 7-8), the underlying appeal encompassed more than three issues. Respondent Wade's opening brief on appeal raises nine factually and/or legally complex constitutional claims. Further, the state court and district court denied several of respondent Wade's constitutional claims by finding them to be harmless error. See Wade v. Vasquez, 752 F.Supp. 931, 935-936. "[A] constitutional error can only be found harmless after a review of the entire record," Ruff v. Kincheloe, 843 F.2d 1240, 1242 (9th Cir. 1988). Most of the district court's harmless error rulings relied exclusively on the reasoning of the state supreme court. Accordingly, the court of appeals de novo review of the denial of the petition, Norris v. Risely, 878 F.2d 1178, 1180 (9th Cir. 1989), perforce included review of the entire state court and district court records. In this context, the "entire record" means "at least . . . the entire trial transcript." Ruff v. Kincheloe, 843 F.2d at 1243, n 5.

In addition, respondent Wade's claim that his principal counsel had a conflict of interest raised serious legal and factual issues outside the trial transcripts themselves. Thus, the court of appeals was required to review many of the district court pleadings, and evidence special counsel presented on the issue as well. Special counsel raised five separate legal arguments why principal counsel had a conflict of interest and why the district court had improperly disposed of the conflict issue. Serving the goal of judicial economy, and ensuring that all of respondent Wade's pending claims would be litigated in a single appellate proceeding, the remand by the court of appeals obviated a possible successive petition on the conflict of interest claim.

While the underlying appeal was pending, on or about March 9, 1992, this Court decided Stringer v. Black, 503 U.S. ___, 112 S.Ct.1130 (1993), which was significant authority relevant to the underlying appeal. The decision in Stringer led to supplemental briefing by the parties and the introduction of two amici curiae who also filed briefs and participated in oral argument. Notably, because of the number and complexity of issues before the court of appeal, and the multiple parties and amici curiae, the panel took the extraordinary measure of extending time for oral argument from forty-five to seventy minutes per side, and the actual arguments lasted over three hours.

The nature and complexity of the issues, as well as the chronology of events in the underlying appeal, involving fifteen briefs totaling approximately six hundred pages, undoubtedly required that after the oral argument the court of appeal review the entire record relevant to the issues presented for decision. The relevant record contains over twelve thousands pages of transcripts and other record documents. Finally, the proposition that this is a factually and legally complex matter is made manifest in the court of appeals' two-volume slip opinion, over eighty pages in length, which includes three diverse opinions that conflict on issues requiring interpretation of both facts and law that arise throughout the voluminous record.

In the context of the procedural history and substance of the underlying appeal, petitioner's claim that the panel refused to decide the matter or was dilatory in any respect, far from being clear and indisputable, is flatly contradicted. Rather, the considered opinions issued by the court of appeal demonstrate a fidelity to their duty under Blodgett to promptly resolve this matter after giving "full and fair consideration to all of the issues presented in the case." In re Blodgett, 502 U.S. ___, 116 L.Ed.2d 669, 112 S.Ct. 674, 676 (1992). Accordingly, the petition should be denied.

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II

A RULE REQUIRING THE NINTH CIRCUIT COURT OF APPEALS TO DECIDE DEATH PENALTY CASES WITHIN 120 DAYS AFTER ORAL ARGUMENT WOULD BE ARBITRARY, IMPRACTICAL, AND WOULD DISRUPT THE ORDERLY ADMINISTRATION OF JUSTICE

Without citation to authority, petitioner asks this Court to take the extraordinary measure of fashioning a rule requiring the court of appeals to decide habeas corpus death penalty cases within 120 days after oral argument. In addition to petitioner's failure to demonstrate the necessity of such a rule, (see part I, supra), this Court should reject petitioner's invitation for several other reasons.

First, petitioner relies upon irrelevant time periods to suggest a time limit of 120 days for the court of appeals to render decisions. Pet. at 20-21, n. 2. Pleading a case, with a right to amend prior to the filing of a responsive pleading, (see rule 11, Rules following 28 U.S.C. § 2254 and Fed. R. Civ. P. 15(a)), or discretionary jurisdictional decisions, are different tasks than deciding the merits of multiple constitutional claims.

Second, by insisting on a hard and fast time limit for decisions, petitioner refuses to acknowledge that death penalty cases, because of the finality in the nature of the punishment, are deserving of the closest scrutiny that can be given by the court of appeals. In any event, petitioner has failed to demonstrate that the time taken to decide respondent's appeal is so atypical for cases of this complexity as to permit an inference, let alone petitioner's thinly veiled allegation, that the court of appeals has deliberately chosen to delay the

adjudication of habeas corpus matters in death penalty cases. Petitioner's requested rule ignores the variables that may affect the amount of time necessary to decide an individual appeal, such as the size of the record or, as here, the issuance of multiple opinions by the individual judges. The arbitrary imposition of a time limit for decisions in capital habeas corpus proceedings assumes a uniformity of legal and factual issues that simply does not exist in these cases.

Finally, petitioner provides no persuasive rationale for imposing such an impractical time limit on the court of appeals. The procedural dynamic of the court of appeals, where individual judges sit on several different panels simultaneously, does not lend itself to an inflexible schedule, in a singular class of cases, such as that proposed by petitioner here. Under the rule petitioner seeks, judges hearing a large-record capital habeas corpus case involving multiple constitutional claims would undoubtedly be compelled to concentrate almost solely on that case, causing delay in their cases involving other panels of judges. Respondent Wade cannot predict to what extent such a rule would disrupt the orderly administration of justice in the court of appeals. That question is best left to the judges of respondent court of appeals. However, some significant disruption would take place if an inflexible time limit were mandated by this Court. Respondent Wade suggests that simple arithmetic evidences that this conclusion cannot be seriously disputed. Over one hundred death penalty habeas corpus cases

have come to the federal courts in the ninth circuit from California alone, more than three times the number of active judges.

Accordingly, a writ of mandamus is not the appropriate vehicle for promulgation of a rule such as the one sought by petitioner. This Court should resist seeking a "quick fix" to calendar management in the lower court that may ultimately create greater delays than those that petitioner alleges to have taken place in the underlying appeal here. Respondent Wade's principal counsel agrees with the sentiments expressed by special counsel as to a proper method for effecting change in the rules governing capital habeas corpus litigation. The petition for writ of mandamus should be denied.

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CONCLUSION

The appellate process will be ill-served by the rule which petitioner urges in these cases, for the haste in which they will be decided will surely lead to chaos in the court of appeals. The orderly administration of justice will be better served by conscientious, full and fair consideration of all issues presented by a habeas corpus petitioner so that all claims may be resolved in a single proceeding. The court of appeals never strayed from that path in the underlying appeal.

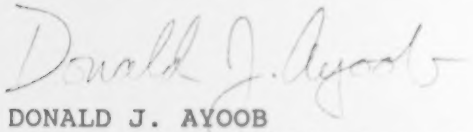
For all the reasons set forth above, the Court should deny the petition for the writ of mandamus.

DATED: May 23, 1994

Respectfully submitted,

FERN M. LAETHEM
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BARRY P. HELFT
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